IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1670 OF 2007

M/s. Sree Laxmi Trading Corporation)
Export (India), a partnership firm)
registered under the Indian)
Partnership Act and having its office)
at Arihant Mansion, 4th floor, 29, K.N.)
Road, Hat Bazar, Mumbai – 400 009.) ... Petitioners

Versus

1. The Tariff Authority for Major)
Ports, a statutory authority)
created under the provisions of)
the Major Port Trusts Act, 1963)
and having its office at Ministry of)
Shipping, Transport Bhawan,)
Sansad Marg, New Delhi – 110)
001.)
2. The Board of Trustees of the)
Mumbai Port Trust, having their)
office at Port House, Shoorji)
Vallabhdas Marg, Ballard Estate,)
Mumbai – 400 001.)
3. The Union of India, having its)
office at Aaykar Bhavan, New)
Marine Lines, Mumbai – 400 020.) ... Respondents

Mr. Birendra Saraf with Ms. Megha Sen i/b M/s. Khaitan & Jayakar for the petitioners.

Mr. E.P. Bharucha with Mr. U.J. Makhija and Mr. M.P.S. Rao i/b M/s. Motiwalla & Co. for respondent No.2.

Ms. Neeta V. Masurkar for respondent 3.

Mr. Milind Vasudeo i/b M/s. Berry & Co. for the intervenor.

Mr. Nitin Thakkar, senior counsel i/b M/s. Mahesh Jani & Co. for the auction purchasers.

CORAM : SWATANTER KUMAR, C.J. & SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT RESERVED : 9TH OCTOBER, 2007.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 18TH OCTOBER, 2007.

JUDGEMENT:- (Per Smt. Ranjana Desai, J.)

1. The petitioners are a partnership firm, carrying on business, inter alia, as exporter of pulses. The petitioners entered into a contract for export of approximately 9781 MTS of bagged maize. The contract was concluded on FOB basis and, consequently, the petitioners were required to cart the cargo into the port precincts and load the same on board of the vessel nominated by the buyer. Accordingly, the petitioners carted the cargo into the port precincts.

2. According to the petitioners, owing to various problems such as non-availability of vessel, the petitioners could not lift the cargo as originally planned. The petitioners managed to lift some portions of the cargo, but a portion of the cargo could not be lifted

and was consequently “shut out”. When the petitioners applied to respondent 2 for permission to retrieve and cart out the “shut out” portion, respondent 2 informed the petitioners that prior to such permission being granted, the petitioners would be required to pay demurrage since the cargo was lying within the port precincts for a period in excess of 7 free days allowed in this respect. It is the case of the petitioners that they were willing to pay demurrage at the old rate but the petitioners were informed by respondent 2 i.e. the Board of Trustees of Bombay Port Trust to make payment of demurrage at the revised rate. The petitioners made a representation to respondent 2 requesting them to apply the old rates. Respondent 2 informed the petitioners that they would consider the petitioners' request but refused to permit the petitioners to cart away the “shut out” portion of the cargo.

3. On or about 13/3/2007 and on 30/3/2007, respondent 2 issued auction notices in respect of 8400 and 8200 bagged cargo respectively belonging to the petitioners. The petitioners corresponded with respondent 2 and requested respondent 2 to apply the old rates and keep the auction in abeyance, but respondent 2 refused to do so. By communication dated 4/4/2007

received on 11/4/2007, respondent 2 called upon the petitioners to make payment of demurrage at the revised rate and clear the cargo, failing which the cargo would be auctioned/disposed of as per sections 61 and 62 of the Major Port Trusts Act, 1963. Making grievance, inter alia, that demurrage charged is arbitrary and excessive, the petitioners filed the present petition on 18/4/2007 praying, inter alia, that the demand of demurrage made by respondent 2 be quashed and that pending the disposal of the petition, respondent 2 be ordered/directed not to auction the "shut out" portion of the petitioners' cargo.

4. On this petition, on 23/4/2007, Rule was issued. As regards the prayer of the petitioners that the auction be stayed, the following order was passed :

> *"4. In the meanwhile, the petitioners shall pay the admitted liability to the respondents within two weeks from today, and in the event the petitioners furnishing a Bank Guarantee for a sum of Rs. One crore with a further undertaking to the Court that in terms of the orders of this Court the balance liability, if any, depending upon the notification being prospective or retrospective, shall be cleared within such time as directed by this Court. Upon payment of the*

admitted sum and furnishing of the Bank Guarantee as above, the respondents shall not dispose of the goods but allow the Petitioners to clear them."

5. Admittedly, the petitioners did not furnish the bank guarantee and challenged the order dated 23/4/2007 in the Supreme Court. We are informed that the said Special Leave Petition is dismissed as withdrawn. In the meanwhile, on 9/7/2007, respondent 2 conducted E-Auction of the petitioners' goods whereby 16110 bags of the said cargo were sold by respondent 2. The petitioners, therefore, took out Notice of Motion No.440 of 2007 inter alia, praying for setting aside the said sale as one M/s. Shakti Trading & Co. offered to purchase the said goods at Rs.525/- per quintal whereas, respondent 2 had permitted the sale at a lower price of Rs.200/- per qunital. M/s. Shakti Trading & Co. through their partner Mr. H.N. Thakkar sought to intervene in this matter. In the affidavit, seeking intervention, Mr. Thakkar stated that the intervenor is ready and willing to pay Rs.525/- per quintal for the said goods and, hence, the intervenor may be permitted to make submissions by means of affidavit of Mr. Thakkar.

6. On 20/7/2007, this court observed that before any order could be passed, it is necessary to see that all the three persons, those who have not lifted the goods at all, and the others to the extent they have not lifted their goods, should be given notice. Hence, court notice was issued to all the auction bidders and hamdast was permitted. The petition was adjourned to 23/7/2007 and a direction was given that in the meanwhile, the goods may not be delivered to the auction bidders. This court clarified that the notices will be issued at the behest of the petitioners and the intervenor, who claims that he is willing to pay Rs.525/- per quintal for the said goods. The intervenor was asked to deposit Rs.10 lacs with the Registry on or before 21/7/2007 to show his bonafides. We are informed that the intervenor has deposited Rs.10 lacs as directed.

7. On receipt of order dated 20/7/2007, the auction purchasers i.e. M/s. Balaji Industries, M/s. Mayur Agro Industries and M/s. Adinath Agro Industries filed their affidavits and requested that the interim order be vacated.

8. On 25/7/2007, a statement was made by the learned counsel for respondent 2 that delivery order has been issued, however

delivery of some of the goods has not taken place. This court ordered that no further delivery should be given.

9. On 10/8/2007, this court passed the following order :

> *"In the meanwhile, respondent Nos.2 and 3, through the Traffic Manager, who is said to be the person in-charge, shall file an affidavit stating as to how the goods which are now valued by the intervenor at Rs.5.25 per kilogram, that too on "as is where is basis: were intended to be disposed of for a sum of approx. Rs.2.51 per kilogram (the goods were sold in lots and this is the approximate rate). We direct the said authority to look into the entire matter and file his personal affidavit before the next date of hearing."*

10. On 3/10/2007, the statements made by learned counsel appearing for the intervenor on instructions from Mr. H.N. Thakkar, who was present in the court, were recorded and accepted by this court without prejudice to the rights and contentions of the parties and subject to the final orders to be passed by this court. We may reproduce below the said order:

> *a) The interveners shall by the entire consignments at the rate of Rs.5,215 per metric tonne.*

b) The consignments be given to the Interveners on "as is where is" basis. However, if the normal weight of the bag is 100 k.g. And it is less by 25% of the actual weight of the bag commercially known, even then the interveners would pay the prorata value to the Port Trust authority. The said is on lot basis as was given to auction purchasers.

c) The interveners have already deposited Rs.10 lacs, which may be paid to the Port authority for adjustment towards the entire sale consideration. In the event of any default on the part of the interveners the said amount shall be liable to be forfeited, and appropriate action will be taken against the interveners in accordance with law as the observations of the court have been clearly understood by the person present in court."

We may make it clear that inadvertently the statement made by counsel for the intervenor is not correctly reproduced in clause (b) of our above order. In fact, counsel for the intervenor had stated that if the normal weight of the bag is 100 kg. and it is less by 25% of the actual weight of the bag commercially known, then the intervenor will pay actual price of the bag of 100 kg. and if the weight of the bag is less by more than 25% then the intervenor will pay prorata value for theactual weight in terms of the price given. This statement was accepted by us being just and proper.

11. Today, we have heard Mr. Saraf, learned counsel appearing for the petitioners, Mr. Bharucha, learned senior counsel appearing for respondent 2, Mr. Vasudeo, learned counsel appearing for the intervenor and Mr. Thakkar, learned counsel appearing for the auction purchasers.

12. The admitted factual position appears to be that there were three consignments of bagged maizes each containing 8200, 3210 and 4700 bags. Out of the first lot of 8200 bags, 5270 bags were cleared by M/s. Mayur Agro Industries at the rate of Rs.2513/- per MT., 2930 bags have yet to be cleared. For the second lot of 3210 bags, M/s. Adinath Agro Industries have offered a rate of Rs.2571/- per MT. These bags have not been cleared. Out of the third lot of 4700 bags, M/s. Balaji Industries have cleared 3355 bags at the rate of Rs.2541/- per MT., 1345 bags have yet to be cleared. The intervener is offering to lift the remaining bags at the rate of Rs.5250/- per MT.

13. Mr. Saraf, learned counsel appearing for the petitioners contended that the petitioners could not clear the cargo because of

circumstances beyond their control and excessive demurrage charged by respondent 2. He submitted that in any case, respondent 2 could not have sold the petitioners' goods at a throw away price. He placed reliance on the judgment of the Supreme Court in ***Divya Manufacturing Company (P) Ltd.Tirupati Woollen Mills Shramik Sangharsha Samity & Anr. v. Union Bank of India & Ors. Official Liquidator & Ors., (2000) 6 SCC 69*** and contended that it is the duty of the court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. Mr. Saraf also relied on interim order dated ***8/9/1998 passed by the Division Bench of this court in M/s. Klenzaids Contamination Controls (P) Ltd. v. Trustees of Port of Bombay & Ors. in Writ Petition No.1339 of 1998*** where despite sale of goods in favour of respondent 1 therein, this court directed the goods to be handed over to the petitioner therein on the ground that Port Trust had auctioned the goods in arbitrary and unreasonable manner. Mr. Saraf contended that in the light of these judgments, this court may set aside the auction sale and ensure that the petitioners' cargo is sold at the highest price.

14. Mr. Bharucha, learned counsel appearing for respondent 2 submitted that respondent 2 has fully carried out the procedure for E-Auction. Notice of E-Auction had been given on the Website of respondent 2 three days prior to E-Auction sale. The E-Auction is not vitiated by any irregularities nor are there any allegations of mala fides. Referring to the grievance made by learned counsel for the parties that substantive quantity of the bagged cargo is pilfered or eaten by rodents because it was not stored properly, Mr. Bharucha contended that there are constraints of space. He submitted that respondent 2 is not primarily concerned with storage of goods. However, respondent 2 shall make efforts to create a proper storage system in the available space.

15. Mr. Thakkar, learned counsel appearing for the auction purchasers submitted that by reason of sections 64 and 20 of the Sale of Goods Act, 1930, and the conditions of auction sale, the sale in favour of the auction purchasers is complete on 9/7/2007 and the property in the goods has passed on to the auction purchases, as the goods sold were specific, in deliverable state and were sold unconditionally. He submitted that the auction

purchasers are the owners of the goods and, therefore, respondent 2 has no right or authority to retract or ask for any more amount from the auction purchasers. Mr. Thakkar contended that the petitioners' own assessment of value of the cargo was less than Rs.20,00,000/- on the date of auction sale. The Port Trust has realized about Rs.40,00,000/- from the auction sale. Besides, the intervenor did not register himself with the auctioneer and no explanation is given as to why the intervenor did not pay the amount on 9/7/2007. Mr. Thakkar contended that the petitioners have put up the intervenor to defeat the auction purchasers' right. He submitted that in the circumstances, the auction sale should not be set aside. In support of his submission, Mr. Thakkar relied on the judgments of the Supreme Court in ***A.V. Thomas & Co. Ltd. v. Deputy Commissioner of Agricultural Income Tax and Sales Tax, Trivandrum, AIR 1964 SC 569 and Consolidated Coffee Ltd. v. Coffee Board, Bangalore, etc., etc. AIR 1980 SC 1468***.

16. Mr. Vasudeo, learned counsel appearing for the intervenor submitted that the allegation of collusion between the intervenor and the petitioners is devoid of substance. He reiterated that the

intervenor is ready and willing to pay the price of Rs.5250/- per MT on “as is where is” basis for the said goods and accept the consignments. He submitted that the if the normal weight of the bag is 100 k.g. and it is less by 25% of the actual weight of the bag commercially known, even then the intervenor will pay actual price of the bag of 100 kg.

17. In ***Divya Manufacturing Company's case (supra)***, the Division Bench of the Calcutta High Court had set aside the sale confirmed in favour of the appellant by the Official Liquidator. It had confirmed the sale in favour of “J” and “S” and directed “J” and “S” to compensate the appellant. The question before the Supreme Court was whether the order of the Calcutta High Court setting aside the sale in favour of the appellant was proper. The Supreme Court referred to its earlier judgments in ***LICA (P) Ltd. v. Official Liquidator (2000) 6 SCC 82*** *and in* ***LICA (P) Ltd. v. Official Liquidator (2000) 6 SCC 79*** and observed that it was the duty of the court to see that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud. The Supreme Court upheld the High Court's order.

18. We may also refer to the judgment of the Supreme Court in ***Yogesh Kalidas Shah v. Union of India & Ors., 1993 Supp (4) SCC 349***. In that case, the grievance of the petitioner was that pending customs clearance, the goods which were held by the Port Trust, were put up by the port authorities for sale for recovery of the port charges. The sale elicited an offer of Rs.32,22,000/-. The sale, however, was not confirmed as in the meanwhile, the petitioner had cleared the port charges then due. The goods were then put up for auction under what is called Walk-in Tender (WIT) Scheme. This time Rs.20,37,000/- were offered by respondent 5. The Port Trust confirmed the sale. The Supreme Court set aside the sale by observing that it will indeed be unconscionable to allow the sale to assume finality. The Supreme Court further observed that it is difficult to appreciate as to how the port authorities found this offer acceptable to them. The goods were directed to be released to the petitioners against the payment of port charges. However, Rs.2,03,700/- which was deposited by the auction purchaser was directed to be refunded to him. The petitioner was directed to pay a lumpsum of Rs.30,000/- as a solatium to the

auction purchaser.

19. Reference can also be made to the interim order passed by this court in ***M/s. Klenzaids Contamination Controls (P) Ltd.'s case (supra)*** where though the goods were sold in an auction in favour of respondent 1, this court directed the goods to be handed over to the petitioner on the ground that the Port Trust had auctioned the goods in arbitrary and unconscionable manner. It may be stated here that on 11/1/2007, this writ petition was disposed of by this court by observing that as per the interim orders of this court, the petitioners were in possession of the goods and the petitioners shall be free to deal with the goods imported by them in the manner they like. Rule was accordingly disposed of. In our opinion, reliance placed on these judgments by the petitioners is apt.

20. Before we deal with the merits of the case in the light of the above judgments, we must express our dissatisfaction about the conduct of the petitioners. The petitioners were directed to furnish bank guarantee in the sum of Rs.1 crore with a further undertaking

to the Court that in terms of the orders of this Court the balance liability, if any, depending upon the notification being prospective or retrospective, shall be cleared within such time as directed by this Court. On that condition, the respondents were directed not to dispose of the goods but allow the petitioners to clear them. The petitioners did not abide by this condition. They did not give bank guarantee. No undertaking was furnished by them. They challenged this order in the Supreme Court. Before the Supreme Court, counsel for the petitioners made a statement that demurrage charges would be paid. Stay was continued on that basis. Further time was sought for payment. Two more opportunities were given by the Supreme Court to pay the charges. The petitioners failed to deposit the money and ultimately withdrew the SLP on 20/6/2007. The said Special Leave Petition was disposed of as withdrawn. Thereafter, till date, the petitioners have not complied with the order of this court. Subsequently, Mr. Kabra, the partner of the petitioners has filed affidavits tendering apology for not complying with the orders of this court. It is stated in the affidavit that at that time, the petitioners were not able to pay the amount within two weeks. However, the petitioners are now in a position to pay the said amount and are ready and willing to pay the said amount in

the time specified by this court. This explanation does not satisfy us. We deprecate the conduct of the petitioners.

21. So far as respondent 2 is concerned, though it is not the allegation of the petitioners that the auction is malafide, we are of the opinion that respondent 2 ought to have been more vigilant while conducting auction. While conducting auction and confirming sale, they should ensure that cargo is not sold at unconscionable rates. Respondent 2 must be conscious of the fact that they are performing a public duty and they are concerned with public funds. We also find substance in the grievance made by the parties that the storage system of respondent 2 is highly dissatisfactory. There is pilferage. Perishable goods like maize with which we are concerned here are likely to deteriorate if they are kept in open space which is likely to be infested with insects and rodents. We are aware that primary function of respondent 2 is not storage of goods. The goods are supposed to be kept in the port precincts only for a short duration. However, respondent 2 should keep in mind the possibility of their requiring to store the goods for a longer period. Present case is an example of such an eventuality. They should be prepared for it. We are aware that respondent 2 does

not have adequate space but they must make the most of whatever space is available to them. We hope and trust that respondent 2 will take appropriate steps in the light of our above observations.

22. Coming to the facts of the present case, undoubtedly, there is a wide difference between the rates offered by the intervenor and the auction purchasers. The sale in favour of the auction purchasers in the circumstances appears to us to be *ex facie* arbitrary and unconscionable. However, in the facts of this case, we do not want to order return and sale of those bags which have already been lifted by the auction purchasers. Sale of those bags which have not been cleared must however be set aside. In the interest of justice, we asked the auction purchasers to match even approximately the price offered by the intervenor and lift the remaining cargo. They were not willing to do so. The judgments of the Supreme Court to which we have made reference hereinabove make it clear that if the sale confirmed pursuant to public auction appears to be *ex facie* unconscionable, it is the duty of the court to intervene and see that highest price is recovered. In matters involving public money, the court will have to be extremely careful

and, if necessary, set aside unconscionable and arbitrary sale by ordering proper compensation to be paid to the auction purchasers to balance equities. Once we hold that the sale confirmed by respondent 2 in favour of the auction purchasers is arbitrary and *ex facie* unreasonable considering the wide difference in price, then in the light of the above judgments, it will have to be set aside and, in that event, the judgments of the Supreme Court in ***A.V. Thomas & Co. and Consolidated Coffee Ltd.'s cases (supra)*** will not help the auction purchasers. In the circumstances, we pass the following order:

23. The auction sale confirmed in favour of the auction purchasers – M/s. Mayur Agro Industries, M/s. Balaji Industries and M/s. Adinath Agro Industries in respect of bags of maize which are not yet lifted by them is quashed and set aside. Respondent 2 shall confirm the sale in respect of the said remaining bags in favour of the intervenor – M/s. Shakti Trading & Co. on "as is where is" basis at the rate of Rs.5250/- per MT. The sale is not on lot basis. If the normal weight of the bag is 100 kg. and it is less by

25% of the actual weight of the bag commercially known, then the intervenor will pay actual price of the bag of 100 kg. and if the weight of the bag is less by more than 25% then the intervenor will pay prorata value for actual weight in terms of the price given. This direction is as per the statement made by counsel for the intervenor on 3/10/2007 which was accepted by us. The intervenor has already deposited Rs.10 lacs in this court. The said amount be paid to respondent 2 for adjustment towards the entire sale consideration. So far as the auction purchasers are concerned, the money deposited by them be returned to them with interest at the rate of 8% per annum from the date of deposit till payment. The petition is disposed of.

[CHIEF JUSTICE]

[SMT. RANJANA DESAI, J.]